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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. IGNACIO CARPIO PEREZ, Defendant and Appellant.	2d Crim. No. B217325 (Super. Ct. No. 2009004415) (Ventura County)

Ignacio Carpio Perez appeals his conviction by plea to transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a)), entered after the trial court denied his motion to suppress evidence (Pen. Code, § 1538.5). We affirm.

Facts and Procedural History

On the evening of February 2, 2009, Simi Valley Police Officer Roy Walker stopped appellant for riding a bicycle on a sidewalk without a light. Appellant was nervous and his eyes were dilated. Appellant said that he was riding to a friend's house and consented to a pat down search which was interrupted when Officer Walker received a radio call to go elsewhere.

About 45 minutes later, Officer Walker saw appellant riding on a sidewalk without a light in an area different from where appellant said he was going. Appellant rode through a red light. Officer Walker stopped appellant again.

Appellant looked surprised, "like a deer in the headlights," and clenched his left hand in a fist. Officer Walker believed appellant was hiding something in his hand, most likely drugs, or was about to punch him. Grabbing appellant's wrist, Officer Walker told appellant to open his hand. Appellant was holding a quarter gram of methamphetamine in his hand.

At the preliminary hearing, appellant agreed the detention was lawful. The magistrate denied the motion to suppress evidence on the ground that the officer had a reasonable suspicion that appellant was holding narcotics or about to punch him when he grabbed appellant's wrist.

Discussion

We defer to the trial court's express and implied factual findings where supported by substantial evidence and independently determine whether, on the facts found, the search was reasonable under Fourth Amendment standards. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

It is uncontroverted that appellant was stopped for three Vehicle Code violations: riding a bicycle on a sidewalk; riding at night without a light; and riding through a red traffic light. (Veh. Code, §§ 21100, subd. (h); 21201, subd. (d)(1); 21453.) Based on the traffic infractions, Officer Walker had probable cause to make a custodial arrest. (*Atwater v. Lago Vista* (2001) 532 U.S. 318, 354 [149 L.Ed.2d 549, 577] [traffic stop and custodial arrest for violation of Texas seatbelt law] (*Atwater*).) "Under *Atwater*, all that is needed to justify a custodial arrest is a showing of probable cause. 'If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.' [Citation.]" (*People v. McKay* (2002) 27 Cal.4th 601, 607 [custodial arrest for riding bicycle on wrong side of street].)

Appellant contends that the rules pertaining to search incident to a lawful arrest do not apply because California law required that he be cited for the traffic infractions (Pen. Code, § 853.5, subd. (a)). A similar argument was rejected by our Supreme Court in *People v. McKay, supra,* 27 Cal.4th 601, 605, which concluded "that custodial arrests for

fine-only offenses do not violate the Fourth Amendment . . . . [C]ompliance with state arrest procedures is not a component of the federal constitutional inquiry." With the passage of Proposition 8, California courts may not exclude evidence on Fourth Amendment grounds "merely because it was obtained in violation of some state statute or state constitutional provision." (*Id.* at p. 608.)

Appellant claims that the search preceded the arrest but that it is immaterial to the Fourth Amendment analysis. (*In re Jonathan M.* (1981) 117 Cal.App.3d 530, 536.) "[W]hen the formal arrest follows quickly on the heels of the challenged search, it is not important the search preceded the arrest rather than vice versa. [Citation.]" (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1075.)

Relying on pre-Proposition 8 cases, appellant asserts that a prolonged detention may transform a traffic stop into an unlawful arrest if there is no reasonable suspicion of criminal wrongdoing. (See *People v. McGaughran* (1979) 25 Cal.3d 577, 591 [10 minute detention following traffic stop unreasonable].) Appellant, however, had dilated pupils, was nervous, was riding in an area different from where appellant said he was going, and committed traffic infractions in the presence of the officer. As Officer Walker approached, appellant made a fist causing the officer to believe that appellant was hiding something or about to punch him. There was no prolonged detention nor was the traffic stop used as a pretext to conduct an exploratory search. (See e.g., *People v. Dickey* (1994) 21 Cal.App.4th 952, 954-955; *People v. Medina* (2003) 110 Cal.App.4th 171, 176-177.)

Citing *Knowles v. Iowa* (1998) 525 U.S 113, 118 [142 L.Ed.2d 492, 499], appellant argues that an officer, in issuing a traffic citation, may not conduct a " 'search incident to [a] citation.' " The case is inapposite because Officer Walker did not issue a citation. Pursuant to *Atwater,* Vehicle Code violations committed in the presence of an officer establish probable cause to make a custodial arrest. (*People v. McKay, supra,* 27 Cal.4th at pp. 605-607.) The officer's election to not issue a traffic citation does not vitiate probable cause for arrest. (See *People v. Gomez* (2004) 117 Cal.App.4th 531, 539.)

Moreover, appellant does not dispute that he was lawfully detained. During the course of a detention, an officer may conduct a protective pat down search for weapons

where the officer "has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." (*Terry v. Ohio* (1968) 392 U.S. 1, 27 [20 L.Ed.2d 889, 909].) The Fourth Amendment has never been interpreted to " 'require that police officers take unnecessary risks in the performance of their duties.' [Citation.]" (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 110 [54 L.Ed.2d 331, 336]; see also *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1255; as mod. 174 Cal.App.4th 1256b.)

Officer Walker was alone, stopped appellant at night in a transient area known for narcotics trafficking, observed that appellant was nervous and had dilated pupils, and believed that appellant was hiding something in his hand. Officer safety was a paramount concern. "I observed as I was approaching [appellant] that his fist was – that he had made his hand into a fist. Whether there's drugs in there or not, for me that is, basically a red flag. If somebody is making a fist, they're either hiding something or getting ready to punch me."

Based on these circumstances, we conclude there were specific and articulable facts to conduct a nonintrusive pat down for officer safety. (*Terry v. Ohio*, *supra*, 392 U.S. at p. 30 [20 L.Ed.2d at p. 911]; *People v. Souza* (1994) 9 Cal.4th 224, 229.) The right to conduct a pat-down includes the right to order a detainee to open his clenched fist. Appellant had no Fourth Amendment right to refuse to open his clenched fist.

The judgment (order denying motion to suppress evidence) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Bruce Young, Judge

Superior Court County of Ventura

Lyn A. Woodward, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, A. Scott Hayward, Deputy Attorney General, for Plaintiff and Respondent.